

IN THE CIRCUIT COURT OF LEFLORE COUNTY, MISSISSIPPI

DEBRA TATE HIBBLER

PLAINTIFF

VERSUS

CIVIL ACTION NO. 2023-0071

JOHNNY LEE GARY, JR.

DEFENDANT

**FINAL JUDGEMENT**

The court is aware that no election is perfect.<sup>1</sup> But the 2023 Democratic primary election for Chancery Clerk was so riddled with fraud in the procurement and filing of absentee ballots, and violations of the Mississippi Election Code,<sup>2</sup> that the court has no choice but to set it aside and order a special election.

**I. BACKGROUND**

Debra Tate Hibbler and Johnny Lee Gary, Jr. were the only two candidates in the August 8, 2023 Democratic primary for Chancery Clerk of Leflore County. On election night, after all precinct votes were counted, Hibbler led Gary by 130 votes. After the first set of absentee votes were counted on election night, Hibbler's lead was cut to only 36 votes. On August 16, when the Resolution Board met to count absentee ballots that had arrived pursuant to the five-day mail-in rule, Gary led by 15 votes and was declared the winner, having received 2,239 votes (50.17%), to Hibbler's 2,224 votes (49.83%), or three thousandths of the votes cast. By any standard, this was a slim margin of victory.

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<sup>1</sup>As counsel for Gary put it, "The Mississippi Supreme Court recognizes that no election is flawless. Therefore, it considers ordering a new election to be a last resort." *citing Wesley v. Wash. Co. Dem. Exec. Com.*, 235 So.3d 1379, 1386 (Miss. 2017).

<sup>2</sup>Miss. Code Ann. § 23-15-1, *et seq.*

**FILED**

FEB 15 2024  
Kelly H. Roberts  
ELMUS STOCKSTILL, CIRCUIT CLERK  
BY Kelly Roberts, D.C.

Hibbler hired legal counsel who, upon examination of the contents of three absentee boxes and six precinct boxes, discovered what he believed to be numerous and substantial irregularities and violations of the Mississippi Election Code, leading Hibbler to timely file a Petition to Contest the Election with Robert Sims, Chairman of the Leflore County Democratic Executive Committee ("LCDEC"). Sims reported that no investigation would be conducted, prompting Hibbler to timely file a Petition for Judicial Review in this court.

The case was tried before a Special Election Tribunal consisting of the undersigned judge sitting by appointment of the Mississippi Supreme Court, together with Leflore County's five Election Commissioners who attended the entirety of the trial.<sup>3</sup>

Because much of the evidence in this case was also to be offered as evidence in a separately-filed Democratic primary election contest for District 4 Supervisor filed by Wayne Self against Eric Mitchell, Civil Action No. 2023-0072-CICI; and because the two cases had the same counsel for both petitioners, the same counsel for both respondents, and the same special judge was assigned by the Supreme Court, all parties and counsel agreed for the two cases to be consolidated for trial purposes. The consolidated trials proceeded for five non-consecutive days, beginning October 13, 2023.

Over the course of the trial, the contestants' counsel reopened three absentee boxes and six precinct boxes in the courtroom under the supervision of the court and the Leflore County Sheriff's Department. Counsel called eleven witnesses to testify. Due to an illness, Leflore County Circuit Clerk Elmus Stockstill, who was scheduled to testify, tragically and unexpectedly

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<sup>3</sup>Miss. Code Ann. § 23-15-931

passed away. In addition to the witnesses' testimony, the parties stipulated 155 exhibits into evidence, some of which were collective exhibits consisting of multiple documents.

Following the trial, the court required the parties to submit proposed findings-of-fact and conclusions-of-law. After receiving and considering counsels' proposals and conducting its own research, the court prepared a summary draft of its Findings of Fact and Conclusions of Law ("FFCL"), following which, the court set a face-to-face conference with the five Leflore County Election Commissioners to learn and consider their views concerning the evidence. And because the two cases were consolidated, the court read out loud each of its individual findings of fact from both cases, and offered each commissioner the individual opportunity to discuss and express their respective opinions, and to dissent to any of the facts found by the court.

Following the review, each of the commissioners were afforded an opportunity to list their disagreement with any of the court's findings. However, all commissioners signed statements indicating their full agreement with the court's findings of fact. The commissioners' respective votes on the court's findings of fact in this case are collectively attached hereto as Exhibit One, and their votes on the court's findings of fact in Civil Action No. 2023-0072-CICI are collectively attached as Exhibit Two. Both these Exhibits are incorporated herein and made a part hereof.

## **II. LEGAL PRECEDENT**

Certification of an election by elected officials is presumed accurate, and to overcome the presumption of correctness, Hibbler was required to meet the so-called *Russell* test by showing either that enough illegal votes were cast for Gary to change the result of the election,

or that there were enough disqualified votes to make it impossible to discern the will of the voters.<sup>4</sup>

Specifically, *Russell* states:

We have employed a two pronged test which though it has been stated in different ways, essentially provides that special elections will be required only when (1) enough illegal votes were cast for the contestee to change the result of the election, or (2) so many votes are disqualified that the will of the voters is impossible to discern.<sup>5</sup>

This test provides two independent paths, one of which the court must traverse to set a special election. In his proposed Findings of Fact and Conclusions of Law, Gary states that “enough illegal votes were cast in the East Greenwood Precinct alone to change the results of the election,” but he urges the court to set the special election for a single precinct, East Greenwood. But, as set out in the court’s FFCL and agreed by the Election Commissioners and adopted herein, numerous violations of the Election Code were found in precincts other than East Greenwood – far more than were necessary to overcome Gary’s slim lead. And while this court is aware of our Supreme Court’s holding that “mere technical irregularities will not vitiate the validity of an election where there is no evidence of fraud or intentional wrongdoing.”<sup>6</sup> But fraud was found to have occurred in this case. And in very clear terms, our Supreme Court has also informed, not only the public, but also the specially-appointed trial judges who hear election

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<sup>4</sup>*Noxubee Cnty Dem. Exec. Comm. v. Russell*, 443 So. 2d 1191, 1197 (Miss. 1983).

<sup>5</sup>*Russell* at 1197

<sup>6</sup>*Smith v. Hollins*, 905 So.2d 1267, 1270 (Miss. 2005) accord *Campbell v. Whittington*, 733 So.2d 820, 826 (Miss. 1996). See also *Straughter v. Collins*, 819 So.2d 1244, 1252 (Miss. 2002).

dispute cases, that absentee voting presents a heightened risk in the election process, and that the provisions that relate to absentee voting are mandatory. For instance, in *Campbell v.*

*Whittington*, the Court stated:

As opposed to voting at the polls, in a public setting where the integrity of the election process can be ensured, absentee voting takes place in a private setting where the opportunity for fraud is greater. To ensure the integrity of the election process through absentee voting, the legislature has seen fit to provide other safeguards. These provisions are mandatory.<sup>7</sup>

This precedential mandate is particularly applicable in this case, given the fraud that occurred and the facts deduced at trial as unanimously agreed by the Election Commissioners.

Some of those facts are set out below:

- Three witnesses established that Dorothy Nichols, also known as Dorothy Glen, came into their homes and committed acts that amount to fraud in the procurement and filing of absentee ballot applications and envelopes.<sup>8</sup>
- No witnesses were called to testify that their absentee ballots were legally and properly procured, completed, and submitted.
- The same Dorothy Nichols witnessed 56 of the absentee ballot applications and envelopes introduced into evidence.
- Delivery to the clerk's office of many of the absentee ballot applications and envelopes handled by Nichols was unreasonably delayed for more than three weeks;
- More than a hundred statutory violations were found in the 102 absentee applications and envelopes entered into evidence;

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<sup>7</sup>*Campbell v. Whittington*, 733 So. 2d 820, 827 (Miss. 1999) (emphasis added) citing *Rogers v. Holder*, 636 So.2d 645, 649 (Miss., 1994).

<sup>8</sup>The specifics of her fraudulent conduct are discussed below. Understandably, Gary makes no mention of Nichols in his proposed FFCL.

- Scanning of the absentee ballots in the clerk's office took place in a room with the door shut, out of view of the public, despite requests by members of the public to open the door and allow public view;
- After all precinct votes were counted, Hibbler led Gary by 130 votes; and only after the absentee votes were counted did Gary take the lead by 15 votes.

### III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings of fact include those set out herein, and those set out in Exhibits One and Two attached hereto and incorporated herein. In applying the court's holding in *Campbell, Rogers*, and other precedent, the court finds that the following violations of the Election Code that were established at trial by clear and convincing evidence have undermined the "integrity of the election process."<sup>9</sup>

#### Findings of Fact Regarding Fraud

The court's findings of fact regarding fraud as set out below should be read together with the more extensive findings of fact agreed by all five Election Commissioners. But the court thinks it important to set out some of them below:

Of the absentee ballots that were witnessed in whole or in part by Nichols;

- Thirty-six envelopes lacked a postmark;
- Seven applications were not witnessed by a person authorized to administer an oath, as required by law;<sup>10</sup>
- Many of the ballot applications and envelopes handled by Nichols were unreasonably delayed in their delivery to the Circuit Clerk's office. For instance, the court notes:
  - Exhibit 5 27 days,
  - Exhibit 6 25 days,
  - Exhibit 12 22 days,
  - Exhibit 15 25 days,

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<sup>9</sup>*Id.*

<sup>10</sup>See Miss. Code § 23-15-627.

- Exhibit 17 22 days,
- Exhibit 19 25 days,
- Exhibit 23 25 days,
- Exhibit 29 21 days,
- Exhibit 48 20 days.

Nichols' handling of the absentee ballot applications and envelopes in question went far beyond the limited involvement contemplated by Miss. Code § 23-15-717, which states that an elector qualified to vote absentee

shall complete an application form as provided in Section 23-15-627, and said elector shall fill in the application as is appropriate for his particular situation;

and Miss. Code § 23-15-631, which instructs an absent elector to mark their ballot in secret while in the presence of the attesting witness, then “fill out and sign” the elector's certificate on the envelope while the attesting witness completes the witness's certification. Rather than merely serving as a witness, the court finds that Nichols was largely responsible for completing all portions of these materials, save only the elector's signature.

The evidence at trial, including the credible testimony of Trinika Lawrence, establishes that Nichols played a substantial role in the outcome of the primary. Her handling of absentee ballot applications and envelopes was “shadowed by allegations and a reasonable inference of fraud; in other words, at least a ‘hint of unseemliness.’”<sup>11</sup>

*Testimony of Trinika Lawrence.*

Lawrence testified that

- Nichols and a second person, Bobbie Peoples, came uninvited to her apartment at a local assisted living facility,
- falsely indicated they were official election workers,

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<sup>11</sup>See *Rogers v. Holder*, 636 So.2d 645, 649 (Miss. 1995).

- closely watched as she selected each candidate on her ballot, and
- left the apartment with Lawrence's completed application, envelope, and ballot.
- Lawrence was not afforded the ballot secrecy required by law.
- Even though Nichols and Peoples left Lawrence's apartment with her ballot and envelope, the Democratic Absentee Ballot Received Report offered into evidence by Petitioners reveals that Lawrence's absentee ballot never reached the Circuit Clerk's office.<sup>12</sup>

Many of the same violations found in the absentee ballot materials handled by Nichols were also found in other applications and envelopes accepted by the Resolution Board.

With respect to the 102 applications and envelopes introduced by Hibbler, the court finds the following statutory violations occurred:

- 63 of the envelopes do not have a postmark in violation of Miss. Code Sections 23-15-631, 637.<sup>13</sup>
- 21 of the applications are not signed by a witness or, if required, a person authorized to administer oaths in violation of Miss. Code § 23-15-627, 631.<sup>14</sup>
- On 11 of the applications and envelopes, the voter signatures do not match, in violation of Miss. Code § 23-15-639.<sup>15</sup>
- 14 of the envelopes were stamped "filed" by the Circuit Clerk's office prior to Election Day, but not considered until August 16, in violation of Miss. Code § 23-15-639 and § 23-15-651.<sup>16</sup>

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<sup>12</sup>See Exhibit 154.

<sup>13</sup>See Ex. 46-50, 57, 59, 61, 62, 65, 68).

<sup>14</sup>See Ex. 2, 7, 16, 21, 34, 37, 39, 43-45, 62, 64, 70, 72).

<sup>15</sup>See Ex. 8, 36, 41, 52, 54-55, 62, 68, 71, 73)

<sup>16</sup>See Ex. 45, 61, 65, 66, 77).

- 1 ballot was accepted on August 16, despite having arrived in an envelope postmarked on August 10, in violation of Miss. Code § 23-15-637.<sup>17</sup>

*Testimony of Melvina Ware.*

In the beginning of her testimony, Resolution Board member Melvina Ware testified that

- she reviewed all of the North Itta Bena absentee ballot materials.
- there are nine elements board members look for, and these elements are found in the Resolution Board guidelines published by the Secretary of State.
- A postmark is not one of the nine elements.<sup>18</sup>
- She was confident in the work performed by the Resolution Board.
- The Resolution Board relies entirely upon the color of the ballot envelope when determining whether the application and envelope must be signed by someone authorized to administer oaths or may be signed by an attesting witness only.
- The Board does not consider the reason for voting absentee as marked by the voter on the application.
- She would be “shocked” to find any significant irregularities, particularly among the North Itta Bena absentee ballots.

However, when given the opportunity to examine the challenged absentee applications and envelopes from the North Itta Bena precinct, Ware affirmed that the applications lacked a witness signature or, if witnessed, required the signature of someone authorized to administer oaths, which they lacked. She then admitted that she indeed was “shocked” at the discrepancies and that she might have been the Resolution Board member in charge of South Itta Bena.

Ware clearly established that the Resolution Board paid no attention to the postmarks which, she testified, would have to be policed by the Circuit Clerk because, in her view, the

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<sup>17</sup>See Ex. 70.

<sup>18</sup>See Ex. 155.

Clerk's office was the "gatekeeper" for absentee ballot materials and that, by the time those materials reached the Resolution Board,

- no one was looking for a postmark,
- no one confirmed that postmarks were within the time allowed,
- no one reviewed the date of the "filed" stamp placed on the envelopes by the Clerk.

Based on the Mississippi Election Code<sup>19</sup> and the trial testimony of Resolution Board member Ware, the Circuit Clerk's office in Leflore County serves a gate-keeping function with regard to the absentee ballots offered to the Resolution Board for consideration, and this "gatekeeper" responsibility was not adhered to during the primary.

When serving as the county registrar, the Circuit Clerk's office is charged with ensuring all absentee ballots offered to the Resolution Board for consideration are submitted by electors who completed their ballot in person in the Clerk's office, or requested a ballot by mail and actually mailed it back to the Clerk's office.<sup>20</sup>

The Circuit Clerk is likewise charged with determining whether the postmark requirement has been satisfied. As with other absentee ballot requirements, the presence of a postmark establishes whether a mail-in ballot was actually returned by mail, as opposed to being hand-delivered, as occurred in *Lewis*, and it establishes the date when the postal service took custody of the absent elector's ballot. Not unlike the record in *Lewis*, the record before this Court

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<sup>19</sup>Exhibit 155.

<sup>20</sup>*Lewis v. Griffith*, 664 So.2d 177, 187 (Miss. 1995) (invalidating absentee ballots hand-delivered to the clerk's office by the clerk herself where the absent electors were able-bodied members of her family who could have complied with the requirement that such ballots be either executed in the clerk's office or returned by mail).

undermines confidence in the absentee ballots offered by the Circuit Clerk to the Resolution Board, and calls into question the results of the primary.

In addition to violations arising out of the failure of the Circuit Clerk's office to perform its gate-keeping function, and of the Resolution Board to accurately screen absentee ballot materials, three witnesses testified to actual fraud in the handling of absentee ballots. The first was Lawrence (see above), and the next two were Teresa Smith and Willie Smith.

*Testimony of Teresa Smith and Willie Smith.*

Similar to Lawrence's experience, the Smiths received an unsolicited visit from Peoples at their apartment in a local assisted living facility. While Mrs. Smith was in the bathroom, Peoples sat down with Mr. Smith and began to complete his ballot for him. The Smiths each testified that Peoples selected the candidates she marked on Mr. Smith's ballot; he did not select those candidates himself or tell Peoples which to select. When Mrs. Smith discovered what was occurring she objected, and Peoples left with Mr. Smith's completed application, envelope, and ballot. The Democratic Absentee Ballot Received Report offered into evidence by Petitioners reveals that Mr. Smith's absentee ballot was cast in the primary.<sup>21</sup>

Three witnesses testified to absentee ballot violations occurring within the Circuit Clerk's office on August 8. Margaret Buchanan, Larry Griggs, and Sam Abraham each testified that the Clerk closed an interior door in his office on the night of the election and proceeded to scan absentee ballots behind the closed door, outside of the view of the public, in violation of Miss. Code § 23-15-523 and § 23-15-581. When Abraham objected, the Clerk insisted the door remain closed. This was a willful violation of the Election Code.

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<sup>21</sup>See Ex. 148.

Hibbler testified the Resolution Board could not maintain a proper count of absentee ballots on August 16, and received at least a half dozen ballots that were not in a secured ballot box. Although Ware did not recall ballots being delivered outside a secured ballot box, Hibbler produced a number of unopened envelopes marked “accepted” by the Resolution Board with uncounted absentee ballots still sealed inside.<sup>22</sup>

The court finds the number and magnitude of the absentee ballot violations proven at trial to be strong circumstantial evidence weighing against the validity and reliability of every absentee ballot. The Court further finds it has no means of excluding the numerous invalid, illegal, and fraudulent absentee ballots because they were “irredeemably and totally mixed in” with the other ballots.<sup>23</sup>

In this case, “[t]he stain of illegality [has] bled from” the known invalid absentee ballots onto the other absentee ballots, “tainting the entire lot,”<sup>24</sup> and the court concludes as a matter of law, all absentee ballots cast in this primary must be thrown out.<sup>25</sup>

Hibbler won a substantial majority of the ballots cast at the voting precincts but, due to the absentee ballots, lost the Democratic nomination for Chancery Clerk. At trial, Hibbler provided credible testimony substantiating that she won a majority of the votes cast at the polls, but lost her race due to absentee ballots. Her testimony was substantially supported by other testimony provided by Griggs.

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<sup>22</sup>See e.g. Ex. 63-64.

<sup>23</sup>See *Self v. Mitchell*, 327 So.3d 93, 95 (Miss. 2021).

<sup>24</sup>*Thompson v. Jones*, 17 So.3d 524, 528 (Miss. 2008).

<sup>25</sup>*Self*, 327 So.3d at 95.

Griggs testified that he was interested in the outcome of the primary because his brother was a candidate, so he went to the Leflore County Courthouse ("Election Central") on the evening of August 8 to monitor the results as they were periodically provided by the Circuit Clerk.

Griggs arrived at Election Central as the voting precincts closed. He gathered printed copies of the election results as they were released.<sup>26</sup> The first set of results Griggs received, printed at 8:26 p.m., reflected the results of 7 of the 18 precincts. Gary led by 128 votes. The second set of results Griggs received, printed at 9:12 p.m., reflected the votes of 15 of the 18 precincts, and Hibbler led by 102 votes. The third set of results Griggs received, printed at 10:39 p.m., reflected the vote of all 18 precincts, and Hibbler's lead had grown to 130 votes.

The court finds Griggs' testimony concerning these precinct results to be credible. Additionally, Griggs, Buchanan, and Abraham all testified that the Circuit Clerk made the decision to scan absentee ballots behind a closed door at Election Central on August 8. Griggs, in particular, established that this occurred late in the evening. He testified that he asked the Clerk after 11:00 p.m. when the absentee ballot count would be complete. The Clerk responded that it would be another hour or so, then he closed the door to the room where a scanner technician was working to complete the count outside of the view of the public. The court finds this testimony to be credible.

The fourth and final set of results Griggs received at Election Central was printed at 12:19 a.m. on August 9, following completion of the absentee ballot count. Although Hibbler still was in the lead, her lead had been considerably diminished by the absentee ballots. Rather than

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<sup>26</sup>See Ex. 138.

the 130 vote margin she enjoyed when the last precincts reported, she was ahead by only 36 votes.

On August 16, the Resolution Board met a second time to count absentee ballots that had arrived pursuant to the five-day mail-in rule. It was only following this count that Hibbler's lead was gone, and she trailed Gary by 15 votes.

During the August 16 meeting, the Resolution Board accepted 42 of the 102 challenged absentee ballot applications and envelopes. These 42 ballots were accepted after the preliminary results of the primary were known.

Of the 42 ballots accepted by the Resolution Board, many of these ballots were so significantly flawed that, when confronted with the ballot applications and envelopes at trial, Ware – a member of the Resolution Board – testified she was “shocked.” This testimony calls into question the seriousness and validity of the count conducted by the Resolution Board.

Additionally, 14 of the ballots that were received prior to August 8 should have been counted then, but were not counted until August 16. This discrepancy was not explained.

The Court finds by clear and convincing evidence that fraud and substantial, serious violations of the Election Code occurred with regard to absentee voting. These violations include the fraudulent procurement by Nichols<sup>27</sup> and Peoples of absentee ballots. Given the number and egregiousness of Election Code violations, the court finds that dozens of absentee ballots were invalid and illegal – far more than Hibbler's 15-vote loss originally reported.

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<sup>27</sup>The court notes that, in a prior election contest, Nichols (then known as Glenn) was found to have “no credibility as a witness” and to be a person with “a propensity to use false addresses to attempt to meet the requirement for candidacy for public office.” *Glenn v. Powell*, 149 So.3d 480, 482 (Miss. 2014).

The illegal ballots have been irrevocably commingled with the valid ballots, rendering it impossible to determine which ballots were legal, and which were not.

The court finds by clear and convincing evidence, including the credible trial testimony of Hibbler and Griggs, that Hibbler won a majority of the legal votes cast at the precincts. When the last precincts reported, she enjoyed a considerable margin of 130 votes. Under these circumstances, this Court finds that all absentee ballots cast in the primary must be thrown out and a new election ordered.

In his proposed Findings of Fact and Conclusions of Law, Gary concedes that the court should find “that enough illegal votes were cast in the East Greenwood Precinct alone to change the results of the election.” However, Gary proposes, without citing authority, that the court should order a new election only in the East Greenwood Precinct. The court declines to do.

The court agrees with counsel for Hibbler that “the authority to order another election on a precinct-by-precinct basis no longer exists once the general ‘election for which the contest nomination is made’ has been conducted,” citing Mississippi Code Section 23-15-937 which provides that

if the judgment is in favor of the contestant, the election of the contestee shall thereby be vacated and the Governor, or the Lieutenant Governor, in case the Governor is a party to the contest, shall call a special election for the office or offices involved.<sup>28</sup>

Thus, this Court lacks authority to order a precinct-by-precinct election. And even if the court had such authority, it would decline to do so in this case because of the fraudulent acts committed and because of the numerous violations of the Election Code. Additionally, throwing

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<sup>28</sup>See also *Blakeney v. Mayfield*, 226 Miss. 53, 64, 84 So.2d 427, 428 (1956); *Randle v. Ivy*, 268 So. 3d 530, 533 (n. 3) (Miss. 2019) (“Although the statute numbers have changed, the text of the statute that Blakeney interpreted matches the pertinent part of Section 23-15-937.”).

out all absentee ballots, including those that were legally cast, would disenfranchise all absentee voters, leaving the true winner of all legally-cast votes a mystery and a scar on our election system.

#### **IV. CONCLUSION**

Based on all that is stated above together with Exhibit One and Exhibit Two, the Court finds the clear and convincing evidence requires a new election for Chancery Clerk of Leflore County. The Court finds, after excluding all absentee ballots, and considering the numerous Election Law violations in this case, the will of the people is impossible to discern and neither the voters nor the candidates can be confident in the certified results. It is, therefore

**ORDERED**, that the election of Johnny Lee Gary, Jr. is hereby set aside and vacated. It is further

**ORDERED**, that Debra Tate Hibbler and Johnny Lee Gary, Jr. are to participate in a special countywide election for the office of Leflore County Chancery Clerk at a date set by the Governor. It is further

**ORDERED**, that the Circuit Clerk or a Deputy Clerk shall provide a certified copy of this FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL JUDGEMENT, together with its two Exhibits to:

- The Honorable Tate Reeves, Governor of the State of Mississippi;
- The Honorable Lynn Fitch, Attorney General of the State of Mississippi;
- The Leflore County Election Commission;
- The Honorable W. Dewayne Richardson, District Attorney for Leflore County.